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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 517

HELEN AUGUSTA VOELKEL, EDNA ELIZABETH PRATT,

Petitioners,

vs.

GEORGE E. TOHULKA, CLARENCE A. TOHULKA, KENNETH D. TOHULKA, MARGUERITE A. HAY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

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INDEX.

	PAGE
Statement of the Case	1
Argument:	
Questions 1 through 6	3
Questions 7 to 8	7
Conclusion	8

CITATIONS.

Ambrose, et al. v. U. S. (1926), 15 F. 2d 52	4
Blanchard v. U. S. (1950), 91 F. Supp. 889	5
Bradley v. U. S. (1944), 143 F. 2d 573	5
Burgess v. Murray (1952), 194 F. 2d 131	3
Christensen v. Christensen (1926), 14 F. 2d 475	4
Claffy v. Forbes (1922), 280 F. 233	4
Cohn, et al. v. Cohn, et al. (1948), 171 F. 2d 828	5
French v. French (1946), 161 Kan. 327, 167 P. 2d 305	4
Kaschefsky v. Kaschefsky (1940), 110 F. 2d 836	4
Shaull v. U. S. (1947), 161 F. 2d 891	3
Shelly v. McKimmis, et al. (1939), 32 Cal. App. 711, 90 P. 2d 842	4

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STATEMENT OF THE CASE.

Petitioner has, for the most part, taken her Statement of Facts from the opinion of the Supreme Court of Indiana. Certain facts, however, should be added and certain conclusions in Petitioner's statement that should be corrected.

Petitioner has correctly stated that while her deceased soldier brother was home on leave, she met with him at an attorney's office to draw his Will, and that at that time and place she agreed to divide all of his government insurance among his brothers and sisters. The Will was then drawn and executed. It also stated that all of the deceased soldier's government insurance be divided among his brothers and sisters, except his brother, Randal. At the time the petitioner, Helen Voelkel, agreed to divide the insurance if she were made beneficiary, the deceased sol-

dier only had $1500 of government insurance in existence, and George E. Tohulka, one of the respondents and a brother of the soldier, was beneficiary of that $1500. Upon his return to camp from leave, twenty days after writing his Will, the deceased soldier took out an additional $8,500 of insurance, and made the petitioner, Helen Voelkel, sole beneficiary of the entire amount.

In Paragraph No. 8, Page 15 of Petition for Writ of Certiorari, under Petitioner's heading "Statement," Petitioner states that after the entire amount of insurance came into existence, there is not a scintilla of evidence in the record that the deceased soldier asked her to divide the proceeds of the insurance. Petitioner fails to note, however, that at the time she made her promise, she was beneficiary of no insurance, and hence had no insurance to divide. Immediately upon her soldier brother's return to camp, he took out a total of $10,000 insurance and made her beneficiary. It was clear from these facts to both trial court and Supreme Court of Indiana that this soldier meant this $10,000 insurance when he obtained Petitioner's promise to divide the proceeds among all of his brothers and sisters. The facts set out by Petitioner on Page 14 of her Petition in Paragraph No. 6 of her "Statement" make it clear that she knew her brother wanted all the government insurance divided, and that she was willing and agreed to do so.

The Supreme Court of Indiana held that though the *res* was not in existence when Petitioner made her first promise to divide, "The facts here show that appellant did reaffirm her original promise after she acquired an interest in the proceeds * * * and entered upon the performance of the task of distribution." In accord with Indiana law, these acts created the trust. Also, the Indiana Court recognized the application of a constructive trust because of Petitioner's unjust enrichment.

ARGUMENT.

Questions No. 1 Through 6.

The Petitioner has set out eight questions submitted to this Court on which she predicated the granting of a certiorari, which, for purposes here, we summarize as follows, relating to "Questions Submitted," 1 through 6:

Whether any of the stated sections of the National Service Life Insurance Act of 1940 prevent the raising of a trust in the proceeds of said insurance in the hands of a beneficiary.

The petition, and in particular the argument contained therein, is directed toward the merits of the case, and certainly is not pointed at all to the propositions of what is important about the problem, nor show that the decision probably is not in compliance with the decisions of the United States Supreme Court.

In its decision, the Supreme Court of Indiana applied equitable principles to carry out the clear expressed and affirmative intent of deceased soldier. There are a series of federal and state cases on this and related problems, all of which hold the soldier's intent foremost in its thinking. In most of these cases the courts have applied trusts to carry out the soldier's intent where the facts, as here, warranted the imposition of the trust to carry out the soldier's expressed clear intent. Most of these cases were cited in the decision of the Supreme Court of Indiana, which appears in the Petition under Appendix A, and which we cite here for the convenience of this Court.

Burgess v. *Murray* (1952), 194 F. 2d 131.
Shaull v. *U. S.* (1947), 161 F. 2d 891.

Kaschefsky v. *Kaschefsky* (1940), 110 F. 2d 836.
Ambrose, et al. v. *U. S.* (1926), 15 F. 2d 52.
Christensen v. *Christensen* (1926), 14 F. 2d 475.
Claffy v. *Forbes* (1922), 280 F. 233.
French v. *French* (1946) 161 Kan. 327, 167 P. 2d 305.
Shelly v. *McKimmis, et al.* (1939), 32 Cal. App. 711, 90 P. 2d 842.

There is no dispute among federal or state courts as to the application of equitable principles in cases of this kind. The Petitioner has not cited a single case from any Court which holds that a *trust* cannot be imposed in the proceeds of government insurance. How can it be doubted, in the absence of specific language and prohibition, that Congress *did not* intend to abolish the application of equitable principles to the National Service Life Insurance, principles so deeply rooted in our system of jurisprudence and applied in these matters to carry out the intent and wishes of our servicemen, who gave their lives serving their country.

In attacking the decision of the Supreme Court of Indiana, Petitioner has done nothing more than put forth her argument on the merits of the case, which argument is replete with misapplication of cases and misconstruction of statutes and regulations. Since Petitioner has seen fit to gear her argument to the merits of the case, we feel constrained to briefly answer her contentions.

Petitioner, in her "Argument," page 19, cites regulations relating to change of beneficiary, "A change of beneficiary, to be effective, must be made in writing signed by the assured." It is immediately clear no change of beneficiary is involved in this case. The Petitioner is now and has always been the named beneficiary of her deceased brother's government insurance. She was intended to be

the beneficiary of that insurance. The judgment of the Court does no more than impress a trust on this beneficiary to do what she agreed to do. Petitioner also mentions and cites a regulation relating to the fact that a beneficiary cannot be changed by Will. "No change of beneficiary may be made by last will and testament." This regulation does no more than set out the general law of insurance—that the beneficiary of an insurance policy is not affected by the provisions of a Will. This rule, however, has never prevented the application of a trust against the beneficiary of the proceeds of such insurance. The purpose of these regulations is undoubtedly to protect the government as to whom they would pay the proceeds of the insurance. That the government pays the named beneficiary is clear. That is exactly what the government is doing in this case. The cases cited by petitioner on Page 20 of her Petition are wholly inapplicable here. All three, *Blanchard* v. *U. S.* (1950), 91 F. Supp. 889, *Bradley* v. *U. S.* (1944), 143 F. (2d) 573, *Cohn, et al.* v. *Cohn, et al.* (1948), 171 F. (2d) 828, involve the problem of who was the intended beneficiary—who should the government pay. In none of these cases was the court faced with the situation in which insured imposed a trust on the intended beneficiary to divide among others in the permitted class as here.

Next, Petitioner contends that Title 38, U. S. C. A., Sec. 454A, prevents the application of trusts. It is clear from the reading of this section that Congress intended to prevent creditors from claiming the benefits of the government insurance. The cases of *United States* v. *Henning* (1952), 344 U. S. 66, 73 S. C. 114, 97 L. Ed. 101, and *Wissner* v. *Wissner* (1950), 338 U. S. 655, 70 S. C. 398, 94 L. Ed. 424, are cited by Petitioner as authority for the proposition that Sec. 454A prevents the application of trust. Neither of these cases involves the question of trust. The *Henning* case is so thoroughly inapplicable

that it was not even mentioned in the decision of the Supreme Court of Indiana. The *Henning* case turned on the question of whether or not a beneficiary must live to take the proceeds of government insurance. The *Wissner* case is readily distinguished in the opinion of the Indiana Supreme Court. It does not involve a question of trusts. The decision prevented a widow from claiming one-half the proceeds of her estranged husband's National Service Life Insurance, though she argued under California law one-half of the premium payments were hers, and hence the proceeds were hers. This was held to be in the nature of creditor claim. In the *Wissner* case the deceased soldier's clear intent was that his estranged wife should not receive any of the insurance, but that his mother, the named beneficiary, receive it all. There were no facts which gave rise to the question of trust, as here.

The language of the Indiana Supreme Court makes it clear that the Court has limited the persons who can take beneficiaries of a trust to persons within the permitted class under the Act. The Court said, in its opinion, as set out in the Petitioner's Appendix A, Page 5a—"There is no prohibition against the transfer or assignment of a beneficiary's interest in such insurance to another person, within the permitted class of beneficiaries, such as brothers and sisters, here." The Supreme Court thus recognized that if a trust or similar device were used to attempt to get the proceeds of government insurance to a person outside the permitted class of beneficiaries, the intent of the statute would be contravened. Under the facts of the case now before this high Court, the beneficiaries of the trust are, as the Petitioner herself, brothers and sisters of the deceased soldier, and all of the same permitted class. Thus, Petitioner's discussion on Page 23 of her Petition is wholly without merit as it assumes that the opinion of the Supreme Court of Indiana was so broad to allow the

application of a trust in any case, whether the beneficiaries of that trust were members of the permitted class or not. This, as has been pointed out, is an erroneous assumption. Nor is the government being asked to pay installments of government insurance to the heirs or legal representatives of the insured, or of any beneficiary in violation of Section 802(J). The government is paying all the installments of the government insurance directly to the named beneficiary, the Petitioner herein. The government is not a party to this action. It is being asked to do nothing contrary to the regulations, and the effect of the decision of the Supreme Court of Indiana has been to require Petitioner, the beneficiary of the insurance, to divide the proceeds of this insurance as the deceased soldier intended, and as she agreed to do, among the other brothers and sisters who are members of the permitted class.

Questions No. 7 and 8.

Petitioner's "Questions Submitted" No. 7 and 8 are not discussed in her "Argument," nor does either raise any federal question. Both relate to the substantive law of trusts or procedure of Indiana, and hence are questions to be determined by Indiana courts. Neither is related in any way to any federal statute, United States Constitution or other federal matter. Nor does Petitioner's statement set out any facts which would give rise to either question, both of which are difficult to understand and appear on their face to be without merit.

Conclusion.

The decision of the Supreme Court of Indiana is in line with the existing decisions on this subject throughout the Nation. No decisions are cited by Petitioner which oppose the proposition that trusts can exist in government insurance to carry out the deceased soldier's intent. There are no decisions by the United States Supreme Court opposing or indicating opposition to this proposition. It is probable to assume that this highest Court would never find in Congressional action an intent to destroy the established application of equitable principles in matters of this kind, unless such intent was expressly set out in the statute. No such expression is shown here. Thus it is probable to believe that the decision of this Court, if Certiorari were to be accepted or were to be granted, would be in accord with the other decisions on this point and with the decision of the Supreme Court of Indiana.

This is not an important question as Petitioner implies. The United States Government is not affected by the decision. The rules and regulations which they have set up pursuant to National Service Life Insurance Act statutes, to pay government insurance, are complied with. The Government pays the designated beneficiary, the Petitioner. As the trust imposed by the Indiana Supreme Court does no more than to require Petitioner to divide the proceeds among other members of the permitted class, under the National Service Life Insurance Act, the policy set out by Congress is not contravened, leaving the express intent of the deceased soldier to be carried out by the Indiana Supreme Court decision. As no important question is raised and as there is no showing that the decision in question is probably contrary to the decision and views

of this Court, Respondents pray that the Petition for Writ of Certiorari be denied.

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